

“ they were only entitled to be ranked on the funds *in medio* for the balance due them, after deduction of all partial payments that they had received to account of their debts; and further, found they were not entitled to the expense of the adjudication at their instance.

In a reclaiming petition, they

Pleaded: When the process of ranking came into Court, the petitioners might have adjudged Clannochyett for their whole debt; and, notwithstanding a partial payment afterwards received by them out of other funds, they would have been entitled to rank for the whole sum contained in their diligence; 16th February 1734, Earls of Loudon and Glasgow against Lord Ross, No. 23. p. 14114. 2d August 1781, Douglas, Heron, and Company, against the Bank of England, No. 35. p. 14131. 8th February 1792, Maxwell's Creditors against Heron's Trustees, No. 63. p. 2136. and as the dividend from Kerse was not accepted extra-judicially, but paid by the act of Court, there is no reason why the petitioners should be in a worse situation as to their security for the balance than before the dividend was received.

The adjudication was necessary for the security of the purchaser; it was the first effectual one, and the other creditors adjudging within the year and day, must, in terms of the act 1661, pay the expense of it.

Observed on the Bench: The debt was in part extinguished by the dividend received from Kerse, and the claimants ought at most to have adjudged only for the balance. But there was no occasion for adjudging at all, as the act of sederunt, 11th July 1794, § 15. declares the decree of sale to be a sufficient title to the purchaser.

The petition was refused without answers.

Lord Ordinary, *Craig*.
D. D.

For the Petitioners, *J. W. Murray*.

Clerk, *Honc.*

Fac. Coll. (APPENDIX), No. 4. p. 6.

1800. February 25.

JAMES FORBES and ATTORNEY against The YORK-BUILDINGS COMPANY.

In 1734, Richard Scarr led an adjudication against the estates of the York-buildings Company, for 350 bonds, which he held in trust against them. These bonds were in the usual English form, the debtor being bound to pay the principal and interest at 4 *per cent.* or the penal sum of double the principal.

Scarr did not take decrees of constitution on them; and this omission was afterwards found not to be fatal to the adjudication; see 31st January 1783, No. 23. p. 228.

He adjudged, not for the penal sums in the bonds, but for the principal and interest due at the date of the decree, with one-fifth of the principal in name of penalty.

Among the bonds adjudged for, were two for £100 each, which the Governor and Company bind themselves to pay, “ with interest after the rate of

No. 9.

the dividend already received; and claimed to be ranked accordingly. But he was found entitled to rank only for the balance due to him at the date of the adjudication; and he was refused the expense of it, because it was posterior to the act of sederunt 11th July 1794, by § 15. of which such adjudications are rendered unnecessary.

No. 10.

An adjudication on an English penal bond, without a decree of constitution, pronounced for the principal and interest, and one-fifth of the principal as penalty, found ineffectual as to the latter.

No. 10. “ 4 per cent. per annum, on the 7th day of April 1732, for the true payment
 “ whereof they bind themselves and their successors in the penal sum of
 “ £.200.”

On these two bonds, the sum adjudged for, was,

Principal and interest,	£264 19 3
Penalty,	40 0 0
	£304 19 3

On this sum, with interest accumulated from 1779, in terms of a previous interlocutor in the ranking, James Forbes and attorney, who had afterward acquired a right to the two bonds, claimed to be ranked on the Company's funds, and obtained a dividend of £85 per cent. along with the great body of the creditors, who had by this time entered into a compromise with the Company, by which £10,000 of the funds was given up to the latter.

James Forbes, who was no party to this transaction, claimed the balance due to him, out of the fund from which the great body of the creditors were thus excluded.

The Company, *inter alia*, objected to the adjudication, in so far as it related to the £40 of penalty; that the creditor might have adjudged either for the penal sums in the bond, which would afterward have been restricted to principal, interest, and expense, or for the principal and interest, but not for both; and, having chosen the latter, he had no authority, without a decree of constitution, to add a penalty, more than if he had adjudged for a bill or other document containing none. Even if the adjudication had proceeded on a decree of constitution, awarding one-fifth more in name of penalty, it would have been restricted to the expense of the adjudication, which in the present case would have been a mere trifle. Adjudications are frequently led on revenue bonds in the English form, but penalties are never included in them; 7th July 1754, Creditors of Burnett against Receiver-General, No. 25. p. 7873.

Answered: If the adjudication had proceeded on a ground of debt, containing no penalty, or upon a decree of constitution awarding one-fifth more in name of penalty, the objection would have been well founded. But here the whole penal sum had become due before the adjudication was led. It was an indulgence to the Company that the claim was restricted, and which would not have been done, if the loss from dead interest had been foreseen; 31st January 1783, Smith, &c. against Martha Grove, &c. No. 23. p. 228.

The Lord Ordinary reported the cause on Memorials, when much doubt was expressed of the propriety of the decision last mentioned.

The Court adopted the argument of the Company, and unanimously sustained the objection.

Lord Ordinary, *Meadowbank*.

For Forbes, *Mat. Ross. Montgomery, Ar. Campbell, jun.*

Alt. Lord-Advocate *Dundas, Jo. Clerk.*

Clerk, *Colquhoun.*

D. D.

Fac. Coll. No. 165. p. 369.